283, 289; WILLISTON, SALES, §§ 284, 305. It makes no difference that here the shipper's purpose is to defraud third persons. For a discussion of the presumption of assent to the late shipment, see NOTES, p. 555.

STATUTE OF FRAUDS — PART PERFORMANCE — MUTUAL WILLS. — A husband and wife orally contracted that all their property should go to the survivor. Shortly thereafter each made a will leaving all property to the other. Four days before his death, the husband, without the knowledge or consent of the wife, made a new will leaving real property to the defendants. *Held*, that the contract is specifically enforceable. *Brown* v. *Webster*, 134 N. W. 185 (Neb.).

A contract to devise is specifically enforceable against heirs, devisees, or grantees. *Smith* v. *Yocum*, 110 Ill. 142; *Crofut* v. *Layton*, 68 Conn. 91, 35 Atl. 783; *Parsell* v. *Stryker*, 41 N. Y. 480. However, an oral contract to devise realty will not be enforced in the absence of sufficient part performance to take the contract out of the Statute of Frauds. *Harder* v. *Harder*, 2 Sandf. Ch. (N. Y.) 17; *Weeks* v. *Lund*, 69 N. H. 78, 45 Atl. 249. The mere making of mutual wills has been held insufficient part performance. *Hale* v. *Hale*, 90 Va. 728, 19 S. E. 739. This has been so held on the ground that the survivor has not changed his position by such performance. *Gould* v. *Mansfield*, 103 Mass. 408; *Stone* v. *Hoskins*, [1905] P. 194. One case holds the contrary view, declaring that the survivor has undergone a risk for which money damages would be inadequate compensation. *Turnipseed* v. *Sirrine*, 57 S. C. 559, 35 S. E. 757. This view, it is submitted, is the better, and on this ground the principal case seems correct if the will is clearly referable to the contract, which, it is submitted, is questionable. Further, it has been held, in accord with the principal case, that subsequently executed mutual wills, though not referring to the contract, are in themselves a sufficient memorandum under the statute. *Shroyer* v. *Smith*, 204 Pa. St. 310, 54 Atl. 24. However, the opposite view seems preferable. *Hale* v. *Hale*, *supra*.

TRUSTS — POWERS AND OBLIGATIONS OF TRUSTEES — RIGHT OF TRUSTEE WITH LIFE INTEREST IN RES TO PROFITS FROM UNAUTHORIZED INVESTMENTS. — A trustee who was also life tenant of the *res* expended part of the fund in unauthorized investments and received thereby a larger income than could have been gained from authorized securities. *Held*, that the remainderman cannot recover the excess of income from the trustee's estate. *In re Hoyles*, [1912] 1 Ch. 67.

It has been held that a trustee making unauthorized investments and paying increased profits to the tenant for life is discharged from liability if the original fund is paid undiminished to the remainderman. *Slade* v. *Chaine*, [1908] 1 Ch. 522. But *cf. Dimes* v. *Scott*, 4 Russ. 195; *In re Hill*, 50 L. J. Ch. 551. Such a question, however, is in its essentials a controversy as to the rights of the two *cestuis que trust*, and does not involve the question of any profit arising to the trustee. It is an elementary proposition that a trustee should not make a profit out of his office. See LEWIN, TRUSTS, 12 ed., 306. When his breach of trust works evident damage to the *cestui*, it is clear that he must make reparation. *Wightwick* v. *Lord*, 6 H. L. Cas. 217. In the principal case the trustee has taken an unauthorized risk in respect to the trust *res* and has paid the increased compensation gained thereby to himself as life tenant. By his dual relation to the *res* he has gained a profit at the risk of the remainderman. As a practical result the decision allows a trustee to make a profit out of his position.

WILLS — CONSTRUCTION — "ISSUE" HELD TO MEAN "DESCENDANTS." — A will contained a devise to A. for life, and after his decease, leaving a wife

surviving, to her for life, then to A.'s issue. *Held*, that the last gift is too remote. *Taylor* v. *Blake*, [1912] 1 I. R. 1.

A gift to a class to be determined at the death of an unascertained wife is too remote, as the wife may not be *in esse* at the time of the gift. If in the present case "issue" were construed to mean "children," the gift would be good, as the class would be determined on A.'s death. But the case adopts the English rule of construction that "issue" *primâ facie* means "descendants." *Leigh* v. *Norbury*, 13 Ves. Jr. 340. Chancellor Kent and Judge Redfield believed the primary meaning of the word was "children." See 4 KENT, COMM., *278, note; 2 REDFIELD, WILLS, 1 ed., 357, note. A few states have adopted their view. *Thomas* v. *Levering*, 73 Md. 451, 21 Atl. 367. See *Brisbin* v. *Huntington*, 128 Ia. 166, 173, 103 N. W. 144, 147. The modern tendency is to allow slight circumstances to change the meaning to "children." *Palmer* v. *Horn*, 84 N. Y. 516; *Shalters* v. *Ladd*, 141 Pa. St. 349, 21 Atl. 596. But even states that have been most liberal in this adhere to the English rule as to the *primâ facie* meaning, where there are no modifying circumstances. *Schmidt* v. *Jewett*, 195 N. Y. 486, 88 N. E. 1110. The principal case is right in holding that the rule against perpetuities cannot affect the construction. See GRAY, RULE AGAINST PERPETUITIES, 2 ed., § 629. Two American cases construe "issue" as "descendants" even though this results in a perpetuity. *Estate of Cavarly*, 119 Cal. 406, 51 Pac. 629; *Bartlett* v. *Sears*, 81 Conn. 34, 70 Atl. 33.

WILLS — CONSTRUCTION — PARTICULAR WORDS: "IN CASE OF DEATH." — A. devised realty and personalty to his wife for life, and after her death to his eight children, and in case of the death of one or more of the children, their share or shares to be equally divided between the survivors. All the children survived the testator; one died before the widow; the widow died. *Held*, that the heir and personal representative of the deceased child are entitled to his share. *Re Poultney*, 56 Sol. J. 252 (Eng., Ch. D., Jan. 19, 1912).

Where, after an absolute gift, there is a gift over in the event of the death of the legatee, questions of construction arise. Death, which is certain, is spoken of as contingent. If the gift is an immediate gift to A., and if he dies, then to B., it means death in the testator's lifetime. *Hinckley* v. *Simmons*, 4 Ves. Jr. 160; *Whitney* v. *Whitney*, 45 N. H. 311; *Fowler* v. *Ingersoll*, 127 N. Y. 472, 28 N. E. 471. If the gift is future, as in the principal case, it might mean either dying before the testator or before the period of vesting in possession. By the weight of authority, it is taken to mean the latter. *Hervey* v. *M'Laughlin*, 1 Price 264; *Beatty's Admr.* v. *Montgomery's Executrix*, 21 N. J. Eq. 324. *Contra*, *Johnes* v. *Beers*, 57 Conn. 295, 18 Atl. 100. It is said that the testator is not presumed to have contemplated the event of the legatee's dying before himself. See *Green* v. *Barrow*, 10 Hare 459, 461. This is, of course, only a rule of construction. *Milner* v. *Milner*, 34 Beav. 276. See 1 WILLIAMS, EXECUTORS, 10 ed., 1007. Even as such its soundness is questionable, for it is inconsistent with the tendency to avoid a construction which would divest an estate. *In re Cobbold*, [1903] 2 Ch. 299. It is submitted that more satisfactory results will be reached if courts, as in the principal case, construe each particular will unhampered by a rule of construction.

WILLS — CONSTRUCTION — TAKING PER STIRPES OR PER CAPITA. — The testator devised land to A. for life and at her death, provided she died without issue, to be equally divided between "the bodily heirs" of X. and Y. The probate court construed the will as giving a half interest to the bodily heirs of X. and a half interest to the bodily heirs of Y. *Held*, that this is error, since all the children should take in equal parts. *Taylor* v. *Cribbs*, 56 So. 952 (Ala.).

In the absence of any intention to the contrary on the face of the will, the general rule is that all take *per capita* rather than *per stirpes* under a gift to the